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Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-first session, 17–26 April 2018

Opinion No. 5/2018 concerning André Okombi Salissa (Congo)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The mandate of the Working Group was most recently extended for a three-year period in Council resolution 33/30.

2. In accordance with its methods of work (A/HRC/36/38), on 21 December 2017 the Working Group transmitted a communication concerning André Okombi Salissa to the Government of the Congo. The Government has not replied to the communication. The Congo is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

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Submissions

Communication from the source

4. André Okombi Salissa, born in 1961 in Lékana, is a national of the Congo.

5. According to the source, Mr. Salissa has been a member of the National Assembly for the single-seat constituency of Lékana district, in Plateaux department, since 2002. He previously held various ministerial positions. Mr. Salissa has been the president of the Initiative pour la démocratie au Congo (Initiative for Democracy in the Congo) since 2015 and the founding president of the Convention pour l'action, la démocratie et le développement (Convention for Action, Democracy and Development) since 2002.

6. Mr. Salissa also stood as a candidate in the presidential election of March 2016.

Background

7. The source explains that, between the period leading up to the referendum (October 2015) and February 2017, the Government of the Congo carried out mass round-ups, arrests and arbitrary detentions of persons close to the political opposition who were exercising their right to freedom of expression in protest against the revision of the Constitution of 20 January 2002, the electoral hold-up of 4 April 2016 and the new regime established under the Constitution of 25 October 2015. The source also alleges that human rights abuses were committed against opposition leaders, in particular those who had refused to recognize President Nguesso's victory in the early presidential election of 20 March 2016. Mr. Salissa was one such leader.

Arrest and detention

8. According to the source, the Brazzaville authorities held Mr. Salissa under house arrest from October to December 2015 for protesting against the revision of the Constitution of 20 January 2002.

9. The source claims that Mr. Salissa has been considered an enemy of those in power ever since he began making numerous statements in the media, particularly on foreign radio stations.

10. According to the source, in April 2016, Mr. Salissa was again placed under house arrest following the early presidential election of 20 March 2016 and the announcement of the results by the Constitutional Court. Several weeks later, he fled to protect himself from arbitrary arrest.

11. The source reports that, on 23 September 2016, several weapons were found in a shed on an unused plot of land belonging to Mr. Salissa's wife. An investigation was immediately opened under the flagrante delicto procedure into breaches of internal State security and unlawful possession of weapons and munitions of war. The source alleges that the Congolese State planted the weapons on this unused plot in order to incriminate Mr. Salissa.

12. The source reports that a member of Mr. Salissa's family was questioned in connection with the case. This person was formally charged and detained on remand on 23 September 2016. On 13 December 2016, he was rushed to hospital from the Brazzaville detention centre, where he was being held, as, according to the centre's doctor, he was in a critical condition. He died on 21 December 2016. The source claims that his death was due to the ill-treatment and acts of torture to which he had been subjected during questioning.

13. According to the source, the Directorate General of National Security police services searched the home of Mr. Salissa's wife on 10 January 2017. On the same day, after six months in hiding, Mr. Salissa was arrested by the Congolese authorities in a district in the north of Brazzaville, despite the fact that he enjoyed parliamentary immunity. Mr. Salissa was reportedly held in custody for 13 days at the premises of the Directorate General of National Security.

14. Mr. Salissa was brought before the senior investigating judge several times between 10 and 23 January 2017.

15. The source claims that Mr. Salissa was charged with "unlawful possession of weapons and munitions of war and organizing an attack to overthrow lawfully established institutions and seize power by inciting people to take up arms against the lawful authorities" and that the same charges have been brought against other political opponents.

16. The source explains that, on 23 January 2017, Mr. Salissa was detained on remand at the Brazzaville detention centre pursuant to a warrant issued by the senior investigating judge of the *Brazzaville Tribunal de Grande Instance* (court of major jurisdiction). However, on 24 January 2017, the Public Prosecutor requested that Mr. Salissa should be transferred back to the premises of the Directorate General for National Security. He has since been held in total isolation at these premises and denied all contact with his family.

17. The source reports that, on 8 February 2017, in an action aimed at challenging Mr. Salissa's arrest and arbitrary detention, his lawyer filed an application for the dismissal of the proceedings. On 23 March 2017, the indictment chamber of the Brazzaville Court of Appeal declared the application inadmissible. According to the source, the judges ruled that only the investigating judge or the public prosecutor has the power to raise a procedural irregularity. In the source's view, the ruling leaves detainees without any remedies, in violation of international human rights law.

18. The source also explains that this decision was appealed in cassation on 13 April 2017. On 28 July 2017, the Supreme Court directed the indictment chamber, sitting in a different composition, to declare the application admissible. Consequently, a hearing was held on 30 November 2017 before the indictment chamber of the Brazzaville Court of Appeal, which rejected the application. On 1 December 2017, a new notice of appeal was filed with the Supreme Court.

19. The source also states that Mr. Salissa's lawyers were given a single opportunity to consult a copy of the case file and make their own partial copy. They have since been refused all access to the file although the investigation is ongoing.

Arbitrary detention

20. According to the source, Mr. Salissa's detention violates article 9 (1) of the International Covenant on Civil and Political Rights, which the Congo ratified on 5 October 1983, in four ways: first, it disregards his parliamentary immunity; second, it contravenes the flagrante delicto procedure, which could justify disregard for his parliamentary immunity; third, it violates the procedure applicable to the offence of breach of internal State security; and lastly, it subjects him to unlawful conditions of detention.

21. With regard to Mr. Salissa's parliamentary immunity, the source refers to article 130 of the Constitution of 25 October 2015, which provides that, "when the National Assembly is sitting, no member may be prosecuted or arrested unless so authorized by its Bureau, except in cases of crimes or offences committed in flagrante delicto. [...] When the National Assembly is in recess, no member may be prosecuted or arrested unless so authorized by its Bureau." However, the Bureau of the National Assembly did not receive a request to authorize Mr. Salissa's arrest. The National Assembly did not lift his parliamentary immunity until 19 January 2017.

22. The source also maintains that Mr. Salissa's arrest and detention contravene the legal provisions governing the flagrante delicto procedure, as set out in articles 47 and 48 of the Code of Criminal Procedure. By law, the custody time limit in cases of flagrante delicto is 120 hours. However, although Mr. Salissa was arrested on 10 January 2017, he was not placed in detention pursuant to a warrant until 23 January 2017. Thus, the source submits that Mr. Salissa was held in custody for 13 days, which exceeds the legal limit by 8 days. The source explains that Mr. Salissa's unlawful detention for these 8 days was based partly on applications by the State Prosecutor, all filed on 12 January 2017, for 2-day extensions of the custody time limit.

23. The source also alleges that the classification of the offence as one committed in flagrante delicto is undermined both by the four-month gap between the discovery of the weapons, which constitute the evidence of the offence, and Mr. Salissa's arrest and by the application to the National Assembly to lift his parliamentary immunity.

24. In addition, the source maintains that, although Mr. Salissa is being prosecuted on charges of unlawful possession of weapons of war and breaching internal State security, the Congolese State has not followed the proper procedure for these offences. Only the Investigative Commission has the power to commence investigations against Mr. Salissa for the offence of breaching internal State security. However, the source explains that, in the present case, Mr. Salissa was arrested and detained at the premises of the Directorate General of National Security and then formally charged by the senior investigating judge without any involvement on the part of either the President of Parliament or the Investigative Commission. The source thus considers that the applicable rules were not followed.

25. With reference to the Views of the Human Rights Committee concerning communication No. 1460/2006,[1] the source claims that Mr. Salissa's house arrest, without any legal basis, amounts to deprivation of liberty and arbitrary detention.

26. Lastly, according to the source, in the light of article 625 of the Code of Criminal Procedure, the conditions of Mr. Salissa's detention render it arbitrary, given that he is being detained in a place not provided for by law, that the conditions violate his fundamental rights and that all remedies have been denied to him. The source explains that Mr. Salissa has not been allowed to leave his cell since he was first placed in detention. This means that he has not spent any time outside his cell, in the open air, in nearly a year. In addition, the source claims that Mr. Salissa has been held in total isolation throughout his detention, having had no human contact, other than with his guards and rare meetings with his counsel, and no communication with his family. It is also alleged that Mr. Salissa may not exchange written correspondence with his lawyers and faces difficulties in obtaining meetings with them. When such meetings are granted, they are monitored, limited in duration and exclude the possibility of confidential communication. The source notes that, under the Code of Criminal Procedure, detainees are prohibited from communicating with persons other than their counsel for 30 days only.

Violation of the right to a fair trial and access to a court

27. According to the source, there is a violation of the right to a fair trial and access to a court, in particular under articles 9 (4) and 14 of the Covenant, as Mr. Salissa was denied the right to apply to the indictment chamber to have the proceedings against him dismissed and was not allowed to raise a procedural irregularity before his case was heard on the merits.

Response from the Government

28. On 21 December 2017, the Working Group transmitted the allegations from the source to the Government of the Congo, which replied on 6 March 2018, after the time limit of 19 February 2018. The Government's reply is therefore inadmissible.

Discussion

29. In the absence of a timely response from the Government, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

30. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68). In the present case, the Government has chosen not to challenge the prima facie credible allegations made by the source.

31. The Working Group will assess the situation by addressing, in turn, the circumstances of Mr. Salissa's arrest and detention, the question of his immunity and, lastly, the conditions of his detention, before then coming to a conclusion.

[1] *Yklymova v. Turkmenistan* (CCPR/C/96/D/1460/2006).

Arrest, house arrest and detention

32. The source first states that Mr. Salissa was arrested and then placed under house arrest between October and December 2015 and again placed under house arrest in April 2016, without any legal basis. In the absence of a response from the Government, these allegations are deemed to be credible, and the Working Group will thus treat them as established.

33. The source then states that Mr. Salissa was arrested on 10 January 2017 and has been detained ever since. The Working Group notes that, as is apparent from the source's statement, Mr. Salissa was aware of the charges against him at the time of his arrest, as he had been in hiding since 23 September 2016, when the weapons were found on his wife's property. Moreover, according to the source, the charges eventually brought against him included unlawful possession of weapons and munitions of war. In other words, when Mr. Salissa was arrested and placed in detention, he was aware of the legal grounds.

34. After his arrest, Mr. Salissa was taken into custody, and his detention was extended several times, amounting to 13 days in total. As the Government has chosen not to respond to this allegation, the source's account is deemed to be credible.

35. Lastly, the source submits that Mr. Salissa has been in detention ever since his arrest on 10 January 2017; at the time of the deliberation of the present opinion, no decision had been taken on the merits of his case.

Parliamentary immunity and its effects

36. Mr. Salissa enjoys immunity as a member of Parliament. This means that detention measures cannot lawfully be taken against him unless his immunity has been lifted. However, his immunity was not lifted until 19 January 2017, and no explanation has been given as to how he could have been arrested lawfully on 10 January 2017. In addition, it is unclear how the discovery of a weapons cache could point to a case of flagrante delicto, which would justify detention measures against him even without his immunity being lifted. More importantly, it seems that, although the public authorities could have Mr. Salissa's immunity lifted between the time the weapons were found and the time he came out of hiding, they did not do so.

Working Group's conclusions on the nature of the arrest and detention

37. First, the Working Group concluded that Mr. Salissa's arrest and house arrest in 2015 and 2016 lacked any legal basis. Since its first deliberation in 1993 (see E/CN.4/1993/24), the Working Group has deemed house arrest to constitute a form of detention that may have an arbitrary character. The source refers to the Views of the Human Rights Committee concerning communication No. 1460/2006, in which arrest and house arrest on grounds or in forms not prescribed by law are considered to be violations of article 9 (1) of the Covenant.[2] This double restriction of liberty, without legal basis, constitutes arbitrary detention under category II.

38. Mr. Salissa was held in custody from 10 to 23 January 2017. The Working Group is of the view that custody time limits are an important safeguard for individuals in contact with the criminal justice system. Any extension thereof should be duly justified and remain exceptional. In the present case, the Working Group considers that the repeated and unjustified extension of the custody time limit resulted from an abuse of power.[3] In such circumstances, unduly prolonged custody results in detention that no longer has any legal basis and therefore falls within category I.

39. There can be no doubt that Mr. Salissa still enjoyed parliamentary immunity on 10 January 2017, when he was arrested. His arrest was therefore unlawful and also falls within category I.[4]

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[2] See *Yklymova v. Turkmenistan*.

[3] In this connection, see opinion No. 37/2018, para. 32.

[4] See opinion No. 31/2016, paras. 113 to 115.

40. Secondly, Mr. Salissa has been detained on remand ever since his unlawful arrest. However, detention on remand should be an exceptional measure that must be justified by the authorities.[5] In the present case, his continued detention without judicial monitoring runs contrary to international standards, as set out by the Working Group. His continued detention is therefore also arbitrary under category I.

41. Thirdly, the source alleges a violation of the right to a fair trial on the ground that some judges refused to rule on the applications filed to challenge the legality of Mr. Salissa's arrest and detention. However, the source does not dispute that the Supreme Court set aside this refusal and directed the lower courts to rule on the merits of the applications. There are therefore no grounds on which to find a violation in this regard.

42. However, the source alleges that the authorities are restricting Mr. Salissa's right to be assisted by and to communicate with his lawyer. He has been detained on serious charges, and his right to a fair trial requires the detaining authority to ensure that he can work with his counsel to prepare his defence without hindrance. These restrictions are compounded by the fact that Mr. Salissa has been placed in solitary confinement at the detention centre, without any justification. In the absence of a reply from the Government, the Working Group accepts these claims as proven. The impact of these restrictions and his solitary confinement on the fairness of the proceedings are sufficiently serious to render the detention arbitrary under category III.

43. Lastly, the source alleges that Mr. Salissa has been a victim of ongoing discrimination on the basis of his political opinions, which has led to a series of restrictions on his freedoms since 2015. The Working Group is particularly concerned that Mr. Salissa had been placed under house arrest even before the weapons cache was found and that a member of his family died in detention. The Working Group notes that, even in a violent political context, concerns about public order are no justification for the ongoing victimization of Mr. Salissa, whose sole intention seems to be to play an active role in the running of his country's public affairs. The Working Group is therefore convinced that all the above-mentioned violations stem from political discrimination, in violation of the international obligations of the Congo. His detention is therefore arbitrary under category V.

44. To conclude, the Working Group recalls the concluding observations of the Committee against Torture on the initial report of the Congo (CAT/C/COG/CO/1), in which concern was expressed about the numerous allegations of acts of torture and ill-treatment committed in most of the country's places of detention, particularly at the Directorate General of National Security. The Working Group notes that the allegations made in the present case support the information relayed by the Committee and that, if proven, they would amount to violations of the obligations of the Congo under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which it ratified on 30 July 2003. The Working Group thus expresses concern about these allegations and reminds the Government of articles 7, 10 (1), and 26 of the Covenant and article 5 of the Universal Declaration of Human Rights. Without ruling on the source's allegations concerning degrading treatment, the Working Group is of the view that these allegations should be transmitted to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

Disposition

45. In the light of the foregoing, the Working Group renders the following opinion:

> The deprivation of liberty of André Okombi Salissa, being in contravention of articles 1, 9 and 10 of the Universal Declaration of Human Rights and articles 9, 14 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, III and V.

46. The Working Group requests the Government of the Congo to take the necessary steps to remedy the situation of Mr. Salissa without delay and bring it into conformity with

[5] On this point, see the Working Group's analysis in its 2011 annual report (A/HRC/19/57), paras. 48 to 58.

the relevant international norms, including those set out in the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights.

47. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Salissa immediately and accord him an enforceable right to reparation, including compensation and a guarantee of non-repetition, in accordance with international law, and to provide him with medical care as needed and appropriate for his condition.

48. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Salissa and to take appropriate measures against those responsible for the violation of his rights.

49. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

Follow-up procedure

50. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

(a) Whether Mr. Salissa has been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Mr. Salissa;

(c) Whether an investigation has been conducted into the violation of Mr. Salissa's rights and, if so, the outcome of the investigation;

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of the Congo with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

51. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example, through a visit by the Working Group.

52. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

53. The Government should disseminate through all available means the present opinion among all stakeholders.

54. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and has requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.[6]

[*Adopted on 18 April 2018*]

[6] See Human Rights Council resolution 33/30, paras. 3 and 7.